

BEFORE THE IOWA DEPARTMENT OF REVENUE  
HOOVER STATE OFFICE BUILDING  
DES MOINES, IOWA

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IN THE MATTER OF

AMERICAN FOOD AND VENDING  
SERVICE OF MISSOURI, INC.

124 Metropolitan Park Drive  
Liverpool, New York 13088

SALES AND USE TAX

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DECLARATORY ORDER

DOCKET NO.: 2019-300-2-0492

Pursuant to a Petition for Declaratory Order (“Petition”) filed with the Iowa Department of Revenue (“Department”) by American Food and Vending Service of Missouri, Inc. (“AFV”), and in accordance with Iowa Code section 17A.9 and Iowa Administrative Code rule 701—7.24, the Director issues the following order.

**I. FACTS**

The findings of fact are based on the Petition and other information submitted by AFV.

AFV is a “third-party food service provider” based in the state of New York and operating in Iowa. Pet. for Dec. Order at 1, No. 2019-300-2-0492 (July 22, 2019). AFV enters into contractual relationships with its employer-clients. Each employer-client “own[s] a cafeteria or similar facility” and, pursuant to the contracts with each employer-client, AFV provides “meal and beverage services on the employer’s premises to the employer’s employees.” *Id.* Additionally, AFV provides each employer-client with various other related services including “bookkeeping, housekeeping, and administrative services.” *Id.* Currently, AFV “charges sales tax on the sales of meals and drinks served to its employer-client’s employees as well as on the

subsidies it receives from the employers for costs associated with operating each employer's cafeteria in Iowa." *Id.*

Under each contract, the employer-client provides "the physical plant and certain [fixed and moveable] equipment, including all fixtures, tables, chairs, equipment, silverware, chinaware, glassware, linens, [and] kitchen utensils." *Id.* AFV "hires and supervises all cafeteria employees" and "purchases, prepares, and serves all food." *Id.* AFV and the employer-client collaborate to craft policies related to operating the cafeteria, determining cafeteria staff wages, selecting menu items, and setting prices of items sold in the cafeteria. Food prices are generally set at or above cost and are memorialized in the contract between AFV and the employer-client.

Under AFV's contracts with each employer-client, "at the end of a specified period"—thirty days—AFV "is entitled to receive a fixed administration fee, plus reimbursement of the cost of conducting business, less receipts from sales of meals to the employees." *Id.*; Resp. to Req. for Additional Info. ¶ 1–3 (Sept. 23, 2019). The reimbursement payment is determined by subtracting the total receipts from cafeteria sales from the total "cost of conducting business"—including the cost of food ingredients, labor, supplies, materials, "supervision expenses," and taxes and fees paid by AFV. Pet. for Dec. Order at 1, No. 2019-300-2-0492 (July 22, 2019).

In the event that gross receipts from cafeteria sales exceed the cost of conducting business, AFV is required to pay the excess to the employer-client. If the gross receipts from cafeteria sales are less than the cost of conducting business, the employer-client is required to pay AFV the difference—this is the "employer subsidy." *Id.* The employer subsidy payments result from the "net loss" of AFV in operating an employer-client's cafeteria and the payment by the employer-client is not itemized and does not attribute portions of the loss to particular products or services that result in the loss. Resp. to Req. for Additional Info. ¶ 6 (Sept. 23, 2019).



The employer subsidy ensures that AFV “does not have the full risk of loss in connection with the operations of the employer’s cafeteria.” Pet. for Dec. Order at 2, No. 2019-300-2-0492 (July 22, 2019). AFV receives the employer-client subsidy “[m]onthly, based on AFV’s physical accounting period [of thirty days].” Resp. to Req. for Additional Info. ¶ 17 (Sept. 23, 2019). In contrast, AFV is not often required to pay employer-clients because the gross receipts from cafeteria sales exceed its cost of conducting business “very infrequently.” *Id.* at ¶ 18.

## **II. ISSUE PRESENTED**

The Petition presents one issue for consideration: whether the employer subsidies paid to AFV pursuant to contractual agreements between AFV and its Iowa employer-clients are subject to Iowa’s sales or use tax.

## **III. STANDARD OF REVIEW**

### *A. Declaratory Orders and the Iowa Administrative Procedure Act*

Iowa’s Administrative Procedure Act (“IAPA”) was enacted “to provide a minimum procedural code for the operation of all state agencies when they take action affecting the rights and duties of the public.” Iowa Code § 17A.1(2) (2019). Under the IAPA, “[a]ny person may petition an agency for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the agency.” Iowa Code § 17A.9(1)(a). The IAPA also describes agency rights and responsibilities with respect to declaratory order proceedings. Iowa Code § 17A.9(1)(b)-(8). Pursuant to Iowa Code (“Code”) section 17A.9(2), the Department adopted Iowa Administrative Code rule 701—7.24 which outlines department-specific rules governing declaratory orders. Iowa Code § 17A.9(2); *see also* Iowa Admin. Code r. 701—7.24 (2019).

The purpose of a declaratory order is to provide a “generally available means for persons to obtain reliable information about agency administered law as it applies to their particular circumstances.” *Sierra Club Iowa Chapter v. Iowa Dep’t of Transp.*, 832 N.W.2d 636, 647 (2013) (citing Arthur Earl Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government*, 1-8 (1998)). Declaratory orders are not contested cases that “entitle[] parties affected by the agency action to an adversarial hearing” in order to “adjudicate disputed facts pertaining to particular individuals in specific circumstances.” *Greenwood Manor v. Iowa Dep’t of Pub. Health, State Health Facilities Council*, 641 N.W.2d 823, 834 (Iowa 2002); Iowa Code § 17A.12. Instead, the IAPA “contemplates declaratory rulings by administrative agencies on purely hypothetical sets of facts.” *City of Des Moines v. Pub. Emp’t Relations Bd.*, 275 N.W.2d 753, 758 (1979). As such, “[t]he procedure established by section 17A.9 allows persons to seek formal opinions on the effect of future transactions and arrange their affairs accordingly.” *Bennett v. Iowa Dep’t of Nat. Res.*, 573 N.W.2d 25, 26 (Iowa 1997). Declaratory orders issued by an administrative agency do, however, have “the same status and binding effect as any final order issued in a contested case proceeding.” Iowa Code § 17A.9(7). The Department’s rules governing declaratory orders are consistent with this understanding of the role of declaratory orders in administrative procedure. See Iowa Admin Code r. 701—7.24(1)(b), (9)(a)(2), (9)(a)(6), (9)(a)(8), (12).

#### B. *The Department’s Interpretive Authority*

This Petition asks the Director to determine whether the subsidies paid to AFV by its employer-clients pursuant to their contractual obligations are subject to Iowa’s sales or use taxes. Iowa’s legislature has conferred upon the Director “the power and authority to prescribe all rules not inconsistent with [the statute], necessary and advisable for its detailed administration and to



effectuate its purposes.” Iowa Code § 422.68(1). This authority extends to Iowa’s sales and use tax. Iowa Code § 423.42(1) (extending the authority granted in § 422.68 to Iowa Code chapter 423). The Iowa Supreme Court has consistently held that the legislature’s grant of authority includes the power to interpret Iowa’s sales and use tax statutes through its administrative rules. *City of Sioux City v. Iowa Dep’t of Revenue & Fin.*, 666 N.W.2d 587, 589–90 (Iowa 2003) (finding that the legislature delegated “expressly comprehensive” authority to interpret and administer the law to the Department); *City of Marion v. Iowa Dep’t of Revenue & Fin.*, 643 N.W.2d 205, 207 (Iowa 2002) (“We conclude from this statute [Iowa Code section 422.68(1)] that the matter under consideration has been vested in the discretion of the agency.”). The Department’s authority also extends to determinations of how the statute and agency rules apply to specific sets of facts. *Lowe’s Home Ctrs. LLC v. Iowa Dep’t. of Revenue*, 921 N.W.2d 38, 45 (Iowa 2018) (“Factual determinations as to sales tax obligations are vested in the Department.”); *Iowa Ag Constr. Co., Inc. v. Iowa State Bd. of Tax Review*, 723 N.W.2d 167, 173 (Iowa 2006) (“Because factual determinations are by law clearly vested in the agency, it follows that application of the law to the facts is likewise vested by a provision of the law in the discretion of the agency.”).

### C. Statutory Construction and Interpretation of Tax Statutes

Generally, when interpreting a statute, the Department begins by “examin[ing] the language of the statute and determin[ing] whether it is ambiguous.” *Kay-Decker v. Iowa State Bd. of Tax Review*, 857 N.W.2d 216, 223 (Iowa 2014). If the statute’s language is unambiguous, the express language in the statute is controlling. *Id.* at 223 (citing *Rolfe State Bank v. Gunderson*, 794 N.W.2d 561, 564 (Iowa 2011)). “If, however, the statute is ambiguous,” the Department’s interpretation will seek to effectuate the legislature’s intent. *See Id.* A statute “must

[be] read . . . as a whole and give[n] ‘its plain and obvious meaning, a sensible and logical construction.’” *Id.* at 223 (quoting *Hamilton v. City of Urbandale*, 291 N.W.2d 15, 17 (Iowa 1980)). When ascertaining the meaning of undefined words in a statute, the Department may look to the words’ ordinary usage, dictionary definitions, use in similar statutes, and court rulings to aid in its interpretation. *Id.* at 223 (citing *Gardin v. Long Beach Mortg. Co.*, 661 N.W.2d 193, 197 (Iowa 2003)).

“Special additional principles [of statutory construction] apply in tax cases.” *Iowa Auto Dealers Ass’n v. Iowa Dep’t of Revenue*, 784 N.W.2d 772, 776 (Iowa 2010). When a statute imposes a tax, it “is construed liberally in favor of the taxpayer.” *Scott Cnty. Conservation Bd. v. Briggs*, 229 N.W.2d 126, 127 (Iowa 1975). “However, when the taxpayer relies on a statutory exemption, *the exemption* is construed strictly *against the taxpayer* and liberally in favor of the taxing body.” *Iowa Auto Dealers Ass’n*, 301 N.W.2d at 761 (emphasis added).

#### IV. ANALYSIS AND CONCLUSIONS

##### A. Iowa Sales Tax

###### 1. *Iowa Code Sections 423.2 and 423.3*

The Iowa Code provides that “[t]here is imposed a tax of six percent upon the sales price of all sales of tangible personal property, consisting of goods, wares, or merchandise, sold at retail in the state to consumers or users.” Iowa Code § 423.2(1). The Code defines “tangible personal property” as “personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses.” Iowa Code § 423.1(59). “‘Goods, wares, or merchandise’ means the same as tangible personal property.” Iowa Code § 423.1(21). Additionally, “sale at retail” is defined as “any sale, lease, or rental for any purpose other than resale, sublease, or subrent.” Iowa Code § 423.1(46). Further, the Code defines “sales price” as



“the *total amount of consideration*, including cash, credit, property, and services, for which personal property or services are sold, . . . whether received in money or otherwise.” Iowa Code § 423.1(51)(a) (emphasis added). The Code also imposes a six percent tax on “[t]he sales price of any of the . . . enumerated services” listed in Iowa Code section 423.2(6). Iowa Code § 423.2(6). Included in the list of services that are subject to Iowa sales tax are: “(o) . . . laundering excluding the use of self-pay washers and dryers[;] . . . [and] (z) [j]anitorial and building maintenance or cleaning[.]” Iowa Code §§ 423.2(6)(o), (6)(z).

In addition to the tax imposed on the sales of tangible personal property and enumerated services, the Code imposes “[a] tax of six percent . . . on the sales price from the sales of bundled transactions.” Iowa Code § 423.2(8)(a). “[A] ‘bundled transaction’ is *the retail sale of two or more distinct and identifiable products*, except real property and services to real property, which are sold for *one nonitemized price*.” *Id.* (emphasis added). The Code provides that “[o]ne nonitemized price’ does not include a price that is separately identified by product on binding sales or other supporting sales-related documentation made available to the customer in paper or electronic form.” Iowa Code § 423.2(8)(c).

Section 423.3 provides a number of exemptions to Iowa sales tax. Iowa Code § 423.3. Specifically, the Code exempts “[t]he sales price from all sales of food and food ingredients” from sales tax. Iowa Code § 423.3(57). However, “‘food and food ingredients’ does not include a sale of alcoholic beverages, candy, or dietary supplements; food sold through vending machines; or *sales of prepared food*, soft drinks, or tobacco.” *Id.* (emphasis added). The Code explains that “‘prepared food’ includes:

- (1) Food sold in a heated state or heated by the seller, including food sold by a caterer[;]
- (2) Two or more food ingredients mixed or combined by the seller for sale as a single item[; and]

(4) Food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws. A plate does not include a container or packaging used to transport food.

Iowa Code § 423.3(57)(f)(1)–(2), (57)(f)(4). The Code also explains what is not considered “prepared food.” Iowa Code § 423.3(57)(f)(3).

## 2. Iowa Administrative Code rule 701—231.5

The Iowa Administrative Code provides additional guidance with respect to taxable sales of prepared foods. Iowa Admin. Code r. 701—231.5.<sup>1</sup> The administrative rule reiterates the definition of “prepared food” found in Iowa Code section 423.3(57). Iowa Admin. Code r. 701—231.5(1)(a). The rule further clarifies that “[t]he types of retailers who are generally considered to be offering prepared food for sale include . . . *cafeterias*[.]” *Id.* (emphasis added). When “food is sold for consumption on the premises of a retailer, the food is rebuttably presumed to be prepared food.” *Id.* The rule defines “premises of the retailer” as “the total space and facilities under control of the retailer or *available to the retailer* . . . for the purpose of sale of prepared food and drink or for the purpose of consumption of prepared food and drink sold by the retailer.” *Id.* (emphasis added).

The administrative rule also provides a number of examples that illustrate how the rule is intended to operate when applied to a given set of facts. *Id.* One example describes cafeteria operations. *Id.* The example states that “[a]n insurance company hires a caterer to run a cafeteria which provides food, at low cost, to its employees” and it “pays the caterer an amount, per month, which varies with the number of meals the caterer serves to provide this food service.”

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<sup>1</sup> Petitioner cites Iowa Administrative Code rule 701—20.5 and its provisions on the sale at retail of prepared foods in its Petition. Pet. for Dec. Order at 2, No. 2019-300-2-0492 (July 22, 2019); *see also* Iowa Admin. Code r. 701—20.5. However, for sales of prepared foods “[o]n and after July 1, 2004,” Iowa Administrative Code rule 701—231.5 is controlling. Iowa Admin. Code r. 701—231.5.



*Id.* Applied to that scenario, the rule is applicable to the caterer operating the cafeteria because “the caterer sells the food in a space made ‘available to the retailer [caterer].” *Id.* Further, “the amount which the insurance company pays, on a monthly basis, to the caterer is presumed to be the taxable sales price from the sale of prepared food, as well as the amount paid by the employees to the caterer.” *Id.* (emphasis added).

3. *AFV’s Employer Subsidy Payments Are Taxable under Iowa Code Section 423.2 and Iowa Administrative Code Rule 701—231.5*

As described in the Petition, AFV provides “meal and beverage services on the employer’s premises to employees” and furnishes “other services and supplies” to employers as well. Pet. for Dec. Order at 1, No. 2019-300-2-0492 (July 22, 2019). As a preliminary matter, the food and beverages sold by AFV to its customers are “tangible personal property” under Iowa Code section 423.1(59) because they can “be seen, weighed, measured, felt, or touched.” Iowa Code § 423.1(59). The food that is sold by AFV, specifically, is taxable to the extent that it is “prepared food” under Iowa Code section 423.3(57)(f). Iowa Code § 423.3(57)(f)(1)–(2), (57)(f)(4). AFV notes in its Petition that it already charges, collects, and remits “sales tax on the sales of meals and drinks served to its employer-client’s employees.” Pet. for Dec. Order at 1, No. 2019-300-2-0492 (July 22, 2019). The central issue in this case, however, is whether the employer subsidy, which is paid to AFV by its employer-clients, is subject to Iowa sales or use tax.

The subsidy payments made by AFV’s employer-clients to AFV are subject to Iowa sales tax. As mentioned above, the example in Iowa Administrative Code rule 701—231.5(1)(a) describes the Department’s long-standing interpretation of the Code with respect to the taxability of employer subsidies in the cafeteria context. *See* Iowa Admin. Code r. 701—231.5(1)(a). AFV

contends that the subsidies paid by its employer-clients are not taxable because “the subsidy is not a taxable sale of tangible personal property at retail between a purchaser and a seller.” Pet. for Dec. Order at 2, No. 2019-300-2-0492 (July 22, 2019). As described above, prepared food is “tangible personal property” that is subject to Iowa sales tax under the Code. Iowa Code § 423.2(1); *see also* Iowa Code § 423.3(57)(f). An employer “may not actually and personally consume the meal, but the [employer] is purchasing at retail a portion of the prepared meals sold.” *In re Am. Republic Ins. Co.*, Iowa Dep’t of Revenue & Fin., Dec. Ruling No. 92-30-6-0223 (1992). When an employer pays a subsidy payment to a cafeteria operator, the employer “is essentially paying the additional cost of the prepared meal[s] for the [employer’s] employees and invitees.” *Id.* Here, AFV explained that it determines what items will be included on its menu and the prices it will charge employees in consultation with its employer-clients. When AFV does not sell all of the prepared food to employees, any excess is discarded. That some loss, occasional or otherwise, is anticipated by the parties is evidenced by the nature of the agreement between AFV and its employer-clients, generally, and the subsidy payments, in particular. Effectively, AFV’s employer-clients are purchasing the unconsumed prepared food items that its employees did not purchase.

AFV further contends that the timing of the employer subsidy payment, that it is not paid entirely by employees, and that it is calculated at month’s end—taking into consideration all of the cafeteria’s sales, rather than any particular sale—render the employer subsidy payments untaxable as “fees for services.” Pet. for Dec. Order at 2, No. 2019-300-2-0492 (July 22, 2009). However, the taxability of tangible personal property or services under the Code does not turn on whether the purchaser pays the seller at the time of the sale or at some later time. Iowa Dep’t of



Revenue, Letter of Findings No. 09300088 (Mar. 10, 2009);<sup>2</sup> *see also* Iowa Code § 423.1(51)(a)–(b). Further, nothing in the Code requires the “total amount of consideration” to be paid to the seller by a single payor. Iowa Dep’t of Revenue, Letter of Findings No. 09300088 (Mar. 10, 2009); *see also* Iowa Code § 423.1(51)(a)–(b). Nor does the Code mandate “that subsequent reimbursements [for taxable prepared foods items] be related to a particular sale of a specific meal.” Iowa Dep’t of Revenue, Letter of Findings No. 09300088 (Mar. 10, 2009); *see also* Iowa Code § 423.1(51)(a)–(b). As mentioned above, the employer-client is, through the subsidy payment, essentially paying for the taxable prepared food that goes unconsumed at the end of each thirty-day “specified period.” That the cost of all of the prepared food is not paid by a single purchaser at the time of sale does not render the prepared food nontaxable. Nor does AFV’s transaction structure render the portion of the “total amount of consideration” paid by the employer-client a nontaxable “fee for service.” Further, that the employer-client calculates the subsidy amount owed under the contract at the end of the “specified period” does not alter the taxability of the goods for which the subsidy is paid.

As stated above, AFV asserts that the subsidy payment should not be subject to tax as it is more similar to a “fee for a service.” Pet. for Dec. Order at 2, No. 2019-300-2-0492 (July 22, 2009). In addition to the food AFV prepares for employer-clients and their employees, AFV provides its employer-clients with various other services connected with the operation of the cafeterias—hiring and supervision of cafeteria employees, housekeeping, bookkeeping, and administrative services. AFV explained that “the net loss [from operation of an employer-client’s cafeteria] results in the subsidy [payment].” Resp. to Req. for Additional Info. ¶ 6 (Sept. 23, 2019). As a result, when the employer-client pays AFV, there is no itemized list that describes

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<sup>2</sup> Available at: <https://itr1.idr.iowa.gov/Browse/OpenFile/3294%7C09300088%7CAll%7C%7CAll>.

the amount of the subsidy payment that is attributable specifically to prepared food that is not consumed by the employer-client's employees and amounts attributable to other services provided by AFV. Under Iowa Code section 423.2(8)(a), "retail sale[s] of two or more distinct and identifiable products . . . which are sold for one nonitemized price" are subject to tax as "bundled transactions." Iowa Code § 423.2(8)(a). Under Iowa's administrative rules, "the amount which [a] company pays, on a monthly basis, to [a] caterer [operating employer's cafeteria] is presumed to be the taxable sales price from the sale of prepared food." Iowa Admin. Code r. 701—231.5(1)(a). AFV made clear that the "net loss" from operating an employer-client's cafeteria results in the subsidy payment and that the payment is nonitemized. Under the administrative rules, the amount of the subsidy payment is considered to be the taxable sales price of prepared food. Iowa Admin. Code r. 701—231.5(1)(a). However, even if the Department accepted that some portion of the subsidy payment amount were attributable to the additional services provided by AFV, the entire subsidy payment would still be subject to sales tax because, under Iowa Code section 423.2(8)(a), "two or more identifiable products . . . which are sold for one nonitemized price" are taxable bundled transactions. Iowa Code § 423.2(8)(a). It should be noted, however, that the Department has consistently determined that, in the context of cafeteria operations, where fees are charged by a cafeteria operator for nontaxable services, those payments are not subject to sales tax when identified separately. *See In re Am. Republic Ins. Co.*, Iowa Dep't of Revenue & Fin., Dec. Ruling No. 92-30-6-0415 (1992); Iowa Dep't of Revenue, Letter of Findings No. 09300088 (Mar. 10, 2009). In this case, however, even if a portion of the subsidy payment amount is attributable to additional nontaxable services, because the subsidy payments are not itemized, the payments are taxable in their entirety.

## **B. Iowa Use Tax**



The Iowa Code imposes “an excise tax at the rate of six percent of the purchase price or installed purchase price” on “[t]he use in this state of tangible personal property as defined in [Iowa Code] section 423.1.” Iowa Code § 423.5(1)(a). A tax of six percent is also imposed on “[t]he use in this state of services enumerated in [Iowa Code] section 423.2” when “the service is first used in this state.” Iowa Code § 423.5(1)(e). However, the Code exempts taxable “[t]angible personal property, . . . and enumerated services” from use tax if Iowa sales tax on those products or services “has been paid to the department or the retailer.” Iowa Code § 423.6(1). Here, AFV explained that it has been charging, collecting, and remitting Iowa sales tax both on the prepared food served to its employer-client’s employees and on the subsidy payments made by its employer-clients. Because sales tax has been properly collected on these taxable items, they are exempt from Iowa use tax.

V. ORDER

THEREFORE, based on the facts presented, the foregoing reasoning, and the applicable provisions of law, the issues raised in the Petition for a Declaratory Order are as answered above.

Done at Des Moines, Iowa on this 14<sup>th</sup> day of November, 2019.

IOWA DEPARTMENT OF REVENUE

BY



Kraig Paulsen, Director

CERTIFICATE OF SERVICE

I certify that on this 14<sup>th</sup> day of November, 2019, I caused a true and correct copy of the Declaratory Order of the Director of Revenue to be forwarded by U.S. Mail to the following person(s):

D. Scott Lindstrom  
Polsinelli P.C.  
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Kansas City, Missouri 64112

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124 Metropolitan Park Drive  
Liverpool, New York 13088

  
Hollie Welch, Executive Secretary  
Iowa Department of Revenue